

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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|--------------------|------------------------------|
| DAVID BUCHANAN, | § |
| | § No. 772, 2010 |
| Defendant Below- | § |
| Appellant, | § |
| | § |
| v. | § Court Below—Superior Court |
| | § of the State of Delaware, |
| STATE OF DELAWARE, | § in and for Sussex County |
| | § Cr. ID 0801031784 |
| Plaintiff Below- | § |
| Appellee. | § |

Submitted: May 27, 2011
Decided: August 8, 2011

Before **HOLLAND, BERGER**, and **JACOBS**, Justices

ORDER

This 8th day of August 2011, upon consideration of the parties' briefs and the record on appeal, it appears to the Court that:

(1) The appellant, David Buchanan, filed this appeal from the Superior Court's denial of his first motion for postconviction relief. Having carefully considered the matter, the Court finds no merit to Buchanan's appeal. Accordingly, the judgment of the Superior Court shall be affirmed.

(2) The record reflects that Buchanan and his ex-wife, Barbara Richards, were divorced in 2003. As part of the property division, the Family Court ordered the marital home to be sold. Buchanan refused to cooperate. Therefore, on February 5, 2007, the Family Court ordered that Buchanan be evicted and excluded

from the property. In October 2007, the Family Court issued a criminal contempt order directing State police to physically remove Buchanan from the property. Buchanan thereafter filed a bankruptcy petition on behalf of Buchanan Farms, which temporarily stayed the Family Court's eviction and contempt orders. In January 2008, after the Bankruptcy Court dismissed Buchanan Farms' petition, the Family Court lifted the stay of its prior orders. On January 26, 2008, Richards contacted State police and informed them that she intended to enter the property to prepare it for sale. Officers arrived at the property first, saw smoke coming out of the chimney and Buchanan's vehicle parked in the driveway. They contacted Buchanan on his cell phone. Buchanan denied being inside the house, although officers then saw him flee from the house. The police chased him and arrested him in nearby woods. Upon entering the house, police found a shotgun and ammunition, as well as a broken lock set.

(3) Thereafter, Richards sought a Protection from Abuse Order (PFA) against Buchanan in the Family Court. On March 7, 2008, the Family Court entered a temporary, ex parte PFA, which prohibited Buchanan from possessing firearms, contacting his ex-wife, or entering the former marital property. Buchanan was served with a copy of that order on March 10, 2008. On March 13, 2008, the Family Court held a hearing and issued a permanent PFA against Buchanan containing the same conditions. Buchanan appeared at the hearing and received a copy of the PFA order at its conclusion. Immediately following the

hearing, Buchanan left the courthouse and got in his car. A police officer had run a motor vehicle check on Buchanan earlier in the day and had discovered that Buchanan's driver's license had been suspended. After watching Buchanan drive away from the courthouse, the officer followed him and then stopped him for driving with a suspended license. During that encounter, the officer asked Buchanan if he had anything in the car. Buchanan responded that he might have guns in the car. In fact, the officer found a zippered bag containing two handguns, a loaded magazine, and additional ammunition. Buchanan was again arrested. He was charged as a result of his January 26 arrest with third degree burglary, criminal contempt, resisting arrest, criminal mischief, and possession of a firearm during the commission of a felony. Additionally, he was charged as a result of his March 13 arrest with two counts of carrying a concealed deadly weapon and three counts of possession of a deadly weapon by a person prohibited.

(4) Buchanan did not testify at his trial in September 2008. The Superior Court jury convicted him of third degree burglary, resisting arrest, criminal contempt, three counts of possession of a firearm by a person prohibited (PFPP), and two counts of carrying a concealed deadly weapon. On direct appeal, this Court affirmed all of Buchanan's convictions except his conviction for third degree burglary.¹ Since that time, Buchanan has filed numerous petitions and motions. On August 27, 2010, Buchanan filed his first motion for postconviction relief

¹ *Buchanan v. State*, 981 A.2d 1098 (Del. 2009).

raising claims that both his trial counsel and his appellate counsel were ineffective. The Superior Court denied his motion. This appeal followed.

(5) Buchanan raises two issues in his opening brief on appeal.² First, he contends that the Superior Court lacked jurisdiction in his case because three counts of the indictment against him were defective for failing to list essential elements of the crimes charged pursuant to 11 Del. C. § 1448(a)(6). Second, Buchanan asserts that his counsel was ineffective for failing to challenge: (i) the warrantless search of his house and his vehicle, as well as his warrantless arrests; (ii) the validity of the PFA against him; and (iii) the validity of the indictment, which included multiple gun charges for a single offense.

(6) In reviewing the Superior Court's denial of postconviction relief, this Court first must consider the procedural requirements of Rule 61 before addressing any substantive issues.³ Rule 61(i)(3) bars litigation of any claim that was not asserted in the proceedings leading to the judgment of conviction unless the defendant can establish cause for the procedural default and prejudice. In this case, Buchanan could have raised his defective indictment claim before trial or on direct appeal but failed to do so. To the extent that Buchanan asserts that his trial counsel and/or appellate counsel were ineffective for failing raise this claim previously, we review his contention to determine: (i) whether counsel's representation fell below

² To the extent Buchanan may have raised other issues below, his failure to brief them on appeal constitutes a waiver. *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

³ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

an objective standard of reasonableness; and (ii) but for counsel’s unprofessional errors, whether the outcome of his trial or appeal would have been different.⁴ In reviewing ineffective assistance of counsel claims, a defendant is required to set forth and substantiate concrete allegations of actual prejudice⁵ in order to overcome the “strong presumption” that counsel’s representation was professionally reasonable.⁶

(7) Buchanan asserts that the Superior Court lacked jurisdiction to convict him because the three counts of the indictment that charged him with possession of a deadly weapon by a person prohibited, in violation of 11 Del. C. § 1448(a)(6),⁷ were fatally defective.⁸ Although difficult to understand, Buchanan’s argument appears to be that the PFA entered against him, which prohibited him from possessing weapons, occurred at a civil proceeding that did not afford him the constitutional due process protections of a criminal proceeding. Buchanan appears to argue that the Family Court could not criminalize his legal right to possess

⁴ *Strickland v. Washington*, 466 U.S. 668, 687-88, 692 (1984).

⁵ *Younger v. State*, 580 A.2d at 556.

⁶ *Strickland v. Washington*, 466 U.S. at 689.

⁷ DEL. CODE ANN. tit. 11 § 1448(a)(6) (2007) provides, “(a) Except as otherwise provided herein, the following persons are prohibited from purchasing, owning, possessing or controlling a deadly weapon or ammunition for a firearm within the State: ... (6) Any person who is subject to a Family Court protection from abuse order (other than an ex parte order), but only for so long as that order remains in effect or is not vacated or otherwise terminated, except that this paragraph shall not apply to a contested order issued solely upon § 1041(1)d., e., or h. of Title 10, or any combination thereof.” In Buchanan’s case, the Family Court’s PFA order, dated March 13, 2008, was entered after a finding of abuse under 10 Del. C. § 1041(1)a., b., c., f., or g. The Family Court supplemented its PFA order on March 14, 2008 with a further finding of abuse by Buchanan under 10 Del. C. § 1041(1)e.

⁸ Count 7 of the indictment stated, “David Buchanan, on or about the 13th day of March, 2008, in the County of Sussex, State of Delaware, having been subject to a Family Court Protection From Abuse Order on March 13, 2008, did have in his possession a deadly weapon, a .45 handgun, in violation of Title 11, §1448(a)(6) of the Delaware Code.” Count 9 made the same allegation except Buchanan was charged with having possession of a .22 handgun. Similarly, Count 10 charged Buchanan with having possession of .45 caliber ammunition.

weapons without affording him a criminal trial. According to Buchanan, only a prior criminal conviction, which is entered after a finding of guilt beyond a reasonable doubt, can prohibit a person from possessing weapons. Because the indictment did not allege any prior convictions against him, Buchanan argues, his trial and appellate counsel were ineffective for failing to challenge the indictment and the Superior Court's jurisdiction.

(8) We find no merit to this convoluted argument. A PFA proceeding is a civil proceeding in which the petitioner must establish by a preponderance of evidence that the respondent has committed an act of domestic violence.⁹ If the Family Court finds the respondent has committed an act of domestic violence by a preponderance of the evidence, then the Family Court may enter a PFA order, which, among other things, enjoins a respondent from engaging in particular conduct and requires a respondent to surrender firearms.¹⁰ The PFA order is civil in nature and does not impose any criminal sanctions;¹¹ thus, Buchanan's suggestion that he was entitled to the constitutional due process protections of a criminal trial prior to the entry of the PFA order against him is simply without merit.

(9) Moreover, we reject any suggestion by Buchanan that the Superior Court jury was required to reconsider the underlying merits of the PFA order and

⁹ DEL. CODE ANN. tit. 10, § 1041 (1999); *State v. Manista*, 651 A.2d 781, 784-85 (Del. Fam. 1994).

¹⁰ DEL. CODE ANN. tit. 10, § 1045 (1999).

¹¹ *State v. Manista*, 651 A.2d at 784.

to find the facts supporting the entry of the PFA order beyond a reasonable doubt. In adopting 11 Del. C. § 1448(a)(6), the General Assembly determined that any person subject to a PFA order issued under 10 Del. C. § 1041(1)a., b., c., f., or g. should be prohibited from purchasing, owning possessing or controlling a deadly weapon or ammunition for a firearm within the State.¹² An individual prohibited from possessing weapons or ammunition by such a PFA who knowingly possesses weapons or ammunition is guilty of possession of a deadly weapon by a person prohibited.¹³ Pursuant to 11 Del. C. § 1448(b), the State is only required to prove beyond a reasonable doubt that Buchanan was a “person prohibited” and that he knowingly possessed a deadly weapon or ammunition for a firearm. The State met its burden of proof when it established that Buchanan was subject to a PFA order entered by the Family Court on March 13, 2008 (and supplemented on March 14, 2008)¹⁴ pursuant to 10 Del. C. § 1041(1)a., b., c., f., or g. and that he knowingly possessed two handguns and ammunition for one handgun in direct violation of the PFA.¹⁵

(10) The existence of the PFA against Buchanan was an element of the offense that had to be, and was, proven by the State beyond a reasonable doubt.

This does *not* mean that the State was required to re-try the underlying facts

¹² DEL. CODE ANN. tit. 11 § 1448(a)(6) (2007)

¹³ *Id.* § 1448(b).

¹⁴ The Superior Court specifically rejected Buchanan’s argument that the Family Court’s March 14, 2008 written order superseded the March 13, 2008 PFA order. Instead, the Superior Court held that the March 14 supplement was exactly what it purported to be—a supplement to the March 13 PFA order. We find this holding to be entirely supported by the record.

¹⁵ *Buchanan v. State*, 981 A.2d at 1105.

supporting the PFA, as Buchanan seems to suggest. To the extent Buchanan sought to challenge the validity of the PFA, he had a full and fair opportunity to do so in the Family Court.¹⁶ Accordingly, we reject Buchanan's first argument on appeal.

(11) Buchanan's remaining claim asserts that his trial counsel and appellate counsel were ineffective for failing to challenge the warrantless search of his house and his subsequent arrest as well as the pretextual stop of his car and subsequent arrest, for failing to challenge the PFA, and for failing to challenge the indictment. To prevail on his claims, Buchanan must establish that counsel's performance fell below an objective standard of reasonableness and caused him actual prejudice.¹⁷ Because we find no attorney error, we reject all of Buchanan's claims.

(12) First, the Family Court had entered an order requiring Buchanan to be evicted and physically removed from the marital property.¹⁸ Buchanan, therefore, had no expectation of privacy in the property on January 28, 2008 because he had no legal right to be present on the property. Moreover, Richards, who was a joint owner and had exclusive access to the property pursuant to the Family Court's order, gave the police permission to enter the property. Under the circumstances,

¹⁶ We note that Buchanan did not appeal the PFA order to this Court.

¹⁷ *Strickland v. Washington*, 466 U.S. at 687-88, 692.

¹⁸ Buchanan's suggestion that this order had expired or been vacated is factually inaccurate. There is nothing in the record to support this contention.

there was no basis for counsel to challenge the search of the home or Buchanan's arrest.

(13) Furthermore, contrary to Buchanan's assertion, trial counsel did file a pretrial motion to suppress, which challenged the allegedly pretextual traffic stop that led to the search of Buchanan's vehicle and his resulting arrest on March 13, 2008. As the Superior Court properly held, the stop was not pretextual because the officer had probable cause to stop Buchanan for driving with a suspended license. When asked if he had "anything" in the car, Buchanan volunteered that he might have weapons in the car. At that point, the officer had probable cause to search the vehicle for weapons. Consequently, appellate counsel had no legal basis to challenge the Superior Court's denial of the motion to suppress on appeal. We reject this allegation of attorney error.

(14) Finally, with respect to Buchanan's assertion that counsel was ineffective for failing to challenge the legality of the indictment and the underlying PFA, we have already rejected that argument in addressing Buchanan's first argument on appeal asserting that the Superior Court lacked jurisdiction over him because of the allegedly defective indictment. To the extent Buchanan argues that the indictment also was defective because the three counts of possession of a deadly weapon by a person prohibited should have been merged into a single offense, there is simply no merit to this contention. Buchanan was found in possession of two different handguns as well as ammunition for one of the guns.

Each handgun and the ammunition constituted a different offense. Merger was not appropriate and counsel committed no error in failing to challenge the indictment on these grounds.

(15) Having carefully considered the parties' contentions on appeal, we find it manifest that the judgment below should be affirmed on the basis of, and for the reasons set forth in, the Superior Court's well-reasoned decision dated December 3, 2010.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice